

Richard T. La Jeunesse

Partner

Direct: 513.629.2702

rlajeunesse@graydon.com

September 29, 2016

VIA FEDEX AND ELECTRONIC MAIL

Sarah P. Flanagan, Esq.
Branch Chief, New Jersey Superfund Branch
Office of Regional Counsel
United States Environmental Protection Agency,
Region II
290 Broadway, 19th Floor
New York, NY 10007-1866

**Re: Diamond Alkali Superfund Site, Lower 8.3 Miles of the Lower Passaic River,
Essex and Hudson Counties, New Jersey**

**De Micromis, De Minimis and Cash-Out Settlement Determinations
to include Kao USA Inc. (formerly known as the Andrew Jergens Company)**

Dear Ms. Flanagan:

This email follows up on prior communications, phone conversations and voice messages recently exchanged regarding my client Kao USA Inc. ("Kao") and our steadfast belief and assertion that Kao should be eligible for *de micromis*, *de minimis* and/or cash-out settlement in matters related to the lower 8.3 miles of the Lower Passaic River. We would again respectfully assert that Kao is among the least-connected factually and most marginally-involved parties that have been tagged in this matter. Please excuse our persistence on this, but as we near a point of potential resolution, we want to be doubly sure that Kao is not inadvertently skipped or lost in the *de micromis*, *de minimis* and/or cash-out settlement determinations. Thanks for your understanding.

We previously sent EPA Region II representatives five letters on behalf of Kao dated April 10, 2015, September 9, 2015, March 18, 2016, April 12, 2016, and May 25, 2016 (the "De Micromis/De Minimis Letters"), in which we respectfully requested the opportunity to meet with representatives from EPA to discuss a process for moving forward with potential *de micromis* and *de minimis* settlements pertaining to Kao. Enclosed for your reference please find a copy of the De Micromis/De Minimis Letters.

More recently we also received a copy of the letter from Dan Riesel on behalf of Coats & Clark, Inc. to Eric Schaaf and Walter Mugdan dated August 26, 2016 regarding Lower Passaic River settlement negotiations, in which Mr. Riesel shared certain views on behalf of other small parties regarding a potential settlement framework. While we generally agree with the sentiment that it is time to begin *de micromis/de minimis/cash-out* settlement determinations, we also believe that the

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extremely minimal nexus alleged concerning the Andrew Jergens Company ("Jergens"), the predecessor to Kao, makes our client uniquely positioned as the most *de micromis/de minimis* and cash-out eligible of the large number of PRPs with which we are familiar.

Our prior De Micromis/De Minimis Letters and related communications provide further details on Jergens' alleged nexus to the Lower Passaic River and why Kao should not have been designated as a PRP if the parties who prepared Kao's nexus package had further investigated the facts upon which the allegations against Jergens had been based.

We simply would like to underscore and reaffirm our willingness to work with the EPA to resolve Kao's involvement in this matter as the *de micromis/de minimis*/cash-out deliberations should soon be starting. We would be glad to meet with you and agency representatives directly as needed or helpful to review the matter or take any measure that would serve to advance resolution of Kao's involvement with this matter.

That said, we do appreciate the magnitude of the matter the agency has undertaken and look forward to advancing deliberations at the agency's earliest opportunity.

Thank you for your consideration. Please let us know when you or other appropriate EPA representatives would be available to discuss or communicate further on this matter.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Richard T. La Jeunesse".

Richard T. La Jeunesse

RTL:srh

Enclosures

cc: Juan Fajardo, Esq. Asst. Regional Counsel, USEPA-Region II (via email fajardo.juan@epa.gov)
Eric Schaaf, Esq. Regional Counsel, USEPA-Region II
Walter Mugdan, Director, Emergency and Remedial Response Division, USEPA-Region II
Nicoletta Di Forte, Deputy Director for Enforcement, Emergency and Remedial Response Division
Sam Wood, Esq. Kao USA Inc., General Counsel
M. Zack Hohl, Esq., Graydon Head

ATTACHMENTS

1. April 10, 2015 letter from Richard La Jeunesse, Esq. Graydon Head on behalf of Kao USA, Inc. to Eric Schaaf, Esq. (USEPA-Region II) re: *de micromis* and *de minimis* settlement.
2. September 9, 2015 letter from Richard La Jeunesse, Graydon Head on behalf of Kao USA, Inc. to Eric Schaaf, Esq. (USEPA-Region II) re: *de micromis* and *de minimis* settlement.
3. October 30, 2015 letter/response from Sarah P. Flanagan (USEPA-Region II) copy to Richard La Jeunesse, Graydon Head on behalf of Kao USA, re; Diamond Alkali Superfund Site-Lower Passaic River Study Area (also addressing *de minimis* settlement status pending ROD).
4. March 18, 2016 letter from Richard La Jeunesse, Esq. Graydon Head on behalf of Kao USA, Inc. to Sarah P. Flanagan, Esq. (USEPA-Region II) re: Passaic River *de micromis* and *de minimis* party discussions.
5. April 12, 2016 letter from Richard T. La Jeunesse, Esq. Graydon Head on behalf of Kao USA, Inc. to Nicoletta Di Forte, Sarah Flanagan and Juan Fajardo (USEPA-Region II) re: Passaic River *de micromis*, *de minimis* and cash-out settlement discussions to include Kao USA, Inc.
6. May 25, 2016 letter from Richard La Jeunesse, Esq. Graydon Head on behalf of Kao USA, Inc. to Sarah P. Flanagan, Esq. (USEPA-Region II) re: Passaic River *de micromis*, *de minimis* and cash-out settlement discussions to include Kao USA, Inc.

GRAYDON HEAD

LEGAL COUNSEL | SINCE 1871

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April 10, 2015

FEDERAL EXPRESS

Eric Schaaf, Esq.
Regional Counsel
United States Environmental Protection Agency Region II
290 Broadway
New York, NY 10007-1866

Re: Passaic River De Minimis Settlement

Dear Mr. Schaaf:

We represent Kao USA Inc. ("Kao") in connection with matters related to the 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay (collectively, the "Lower Passaic River Study Area" or the "LPRSA"). This letter follows up on your March 20, 2015 response to Daniel Riesel and the March 10, 2015 letter submitted on behalf of ten entities that have been named potentially responsible parties (PRPs) with respect to the LPRSA.

While we understand EPA's current view that a Record of Decision (ROD) is to be issued for the lower eight miles of the LPRSA before discussions regarding potential *de minimis* and *de micromis* settlements should take place, we ask that you reconsider this position in light of the unique circumstances surrounding the LPRSA. Specifically, information contained in EPA's Superfund Proposed Plan ("Proposed Plan") and the Focused Feasibility Study ("FFS") issued on April 11, 2014 for the lower 8 miles of the LPRSA or in the draft Remedial Investigation Report ("RI Report") for the LPRSA submitted on February 19, 2015 should be sufficient to identify PRPs that could be eligible for *de minimis* and *de micromis* settlements. Delaying discussions with these parties complicates efforts to select a remedy for the LPRSA, particularly with respect to interactions with the primary polluters affiliated with the former Diamond Shamrock Chemicals Company site on Lister Avenue. Laying the groundwork for *de minimis* and *de micromis* settlements now should simplify future negotiations once a ROD is issued.

Regardless of when these meetings occur, Kao asks that it be included in any future meetings or related communications between EPA and PRPs regarding potential *de minimis* and *de micromis* settlements for the LPRSA. While Kao shares many of the sentiments and concerns expressed in the March 10, 2015 letter submitted on behalf of ten PRPs with respect to the LPRSA, any nexus between Kao and the contamination in the LPRSA is even more attenuated than the connections described by those potentially *de minimis* parties. Therefore, for the

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Eric Schaaf, Esq.
April 10, 2015
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reasons stated below, we believe Kao meets EPA's criteria for *de minimis*, and potentially *de micromis*, settlements.

Background

Kao received a General Notice Letter from the United States Environmental Protection Agency ("EPA") dated September 15, 2003 relating to the LPRSA and has voluntarily cooperated with EPA for over 11 years without substantive discussions with EPA regarding *de minimis* or *de micromis* settlements for qualifying PRPs.

Knowing what we do today, Kao should not have been designated as a PRP. Yet since 2003 Kao has reluctantly participated and cooperated in extensive, and very expensive investigations and studies of the LPRSA, all without EPA providing Kao an opportunity to have a fair and balanced determination on the merits of Kao's appropriate classification as a *de minimis* or a *de micromis* party. This reluctant participation was prompted to avoid more draconian unilateral EPA actions threatened against Kao as a PRP. Forcing a marginal or improperly-designated PRP like Kao to participate in an extensive remedial investigation and feasibility study and remediation of the LPRSA for over eleven years without any opportunity to show its lack of contribution to the contamination of the LPRSA is contrary to the principals of due process and fair proceedings.

Operations at the Former Jergens Plant in Belleville, New Jersey

The Jergens brand traces its origins back to 1882 with the founding of the Andrew Jergens Company ("Jergens"). Jergens' products have been used in households throughout the world for over a century. Further, these non-toxic, non-hazardous personal care products are manufactured for direct application to human skin and safe disposal in domestic waste streams, and the products have been used in such a capacity for over 130 years.

Jergens operated a facility in Belleville, New Jersey near the Second River, more than a mile remote from the Passaic River, from around 1940 until the facility was sold in 1975. Jergens manufactured lotions, hand/face creams, shampoos/conditioners, essential oils (i.e. fragrance), and make-up (i.e. foundation powder) at the facility. The principal raw materials used in the Jergens manufacturing process at Belleville plant were deionized water, glycerin, oils & waxes, preservatives & fragrances, foam booster, conditioning agents, and alcohol.

After extensive investigation, Kao is not aware of any evidence that the Jergens plant in Belleville, New Jersey produced or discharged any dioxin, furans, PCBs, mercury, or any contaminants of concern identified in the FFS or the RI Report.

Alleged Discharge from the Former Jergens Plant in Belleville, New Jersey

It has been alleged that in the fall of 1973 the former Jergens plant in Belleville, New Jersey discharged boiler blowdown into the Second River. The 1973 Passaic Valley Sewerage

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Commission ("PVSC") Annual Report characterizes the boiler blowdown from the former Jergens facility in Belleville, New Jersey as "polluting" without further defining the term or the reason for the characterization. According to the 1973 PVSC Annual Report, the former Jergens facility in Belleville, New Jersey was brought into compliance after installing a catch tank followed by sending the blowdown water directly to the sanitary system of the plant. Other than allowing the water to cool in the catch tank, no further treatment was indicated, and no discharge permit was required.

Kao has extensively studied and analyzed operations at its former plant and through a third-party boiler expert has concluded that the boiler did not contribute to the contamination of the LPRSA. The purpose of the boiler blowdown was to prevent scale building up inside the boiler as a result of dissolved solids found in the original river water. The feedwater in the closed boiler system, no matter how pristine, still would have had naturally occurring dissolved salts which would build up when the water boiled.

Small heating boilers, such as the one used at the former Jergens facility, do not create any new substances in their operation or discharge. Therefore, the boiler blowdown from this facility would only have discharged the feedwater taken out of the river at the start of the process. These dissolved solids should not be characterized as hazardous substances. Further, because they are dissolved, they would not settle in the river sediment.

The boiler at the former Jergens facility in Belleville, New Jersey was primarily used for heating purposes in winter months and providing heat for product manufacturing year round. The temperature of the blowdown water, based upon the reported operating conditions, was determined to be about 477°F. The heat of the water discharged during the boiler blowdown would have been the only reason for the determination at that time that the blowdown was "polluting," rather than the discharge of any hazardous substances.

The 1973 PVSC Report states that the solution for addressing blowdown from the former Jergens facility was to deploy a tank to catch the blowdown. The water was then delivered to the sanitary sewer system on site without the need for further treatment. If there were any hazardous substances in the boiler blowdown, additional treatment should have been required. However, that was not the case. The 1973 PVSC Report states that the source of pollution was eliminated. This outcome further supports the conclusion that the blowdown was referred to as "polluting" solely due to the temperature of the blowdown water rather than the discharge of any hazardous substance. Based on its investigations to date, Kao is not aware of any release or threatened release of contaminants of concern during production at the former Jergens plant in Belleville, New Jersey, particularly dioxins, furans, or PCBs.

Conditions for De Minimis and De Micromis Settlement

(i) Per CERCLA Section 122(g)(1)(A)(i): As described above, Kao is not aware of any release or threatened release of contaminants of concern during production at the former Jergens plant in Belleville, New Jersey, including dioxins, furans, or PCBs. The FFS and the RI

Report both identify 2,3,7,8-TCDD dioxin as the primary chemical of concern driving the need to remediate the river. In as much as the former Jergens plant in Belleville, New Jersey did not produce or discharge any dioxins, furans, or PCBs, any contribution by Kao should be *de minimis* (or nonexistent) in comparison to the total hazardous substance in the LPRSA.

Further, hundreds of parties have been identified as potential sources of hazardous substances found in the LPRSA, and the former Diamond Shamrock Chemicals Company, predecessor-in-interest to the Occidental Chemical Corporation ("Occidental"), has been linked to the extensive dioxin contamination throughout the LPRSA. Based on the nature of production at the former Jergens plant in Belleville, New Jersey, its contribution to the contamination of the LPRSA, if any, should be considered *de minimis* when compared to the total contribution of other PRPs, especially Occidental.

(ii) Per CERCLA Section 122(g)(1)(A)(ii): As stated above, after extensive investigation Kao is not aware of any evidence that the Jergens plant in Belleville, New Jersey produced or discharged any dioxin, furans, PCBs, mercury, or any contaminants of concern identified in the FFS or RI Report. Further, the products manufactured at the former Jergens plant in Belleville, New Jersey were non-toxic, non-hazardous personal care products manufactured for direct application to human skin and safe disposal in domestic waste streams.

De Minimis and De Micromis Settlements Are Appropriate at This Time

A small group of PRPs previously petitioned EPA to provide an opportunity for *de minimis* settlement in a letter dated February 2, 2007. In a response letter from George Pavlou dated March 5, 2007, EPA indicated that it did not have sufficient information to distinguish among the various tiers of PRPs in order to identify potentially *de minimis* parties. On April 11, 2014, EPA issued the FFS, which provides detailed estimates of the concentrations of various contaminants of concern throughout the lower 8 miles of the Passaic River and proposes volumes of sediment to be removed from the LPRSA.

Subsequently, on February 19, 2015 a draft RI Report was submitted to EPA. The RI Report details contaminant concentrations throughout the entire LPRSA.

EPA began studying the Newark Bay Study Area in 1984. The Andrew Jergens Company (now Kao USA Inc.) voluntarily participated in the Administrative Order on Consent for Remedial Investigation and Feasibility Study dated February 13, 2004, agreeing to contribute to funding EPA's study of the LPRSA. Since then, Kao has reluctantly participated in two additional administrative orders regarding the study and remediation of the LPRSA.

After studying the LPRSA for over eleven years and Newark Bay for over three decades, it is time for EPA to give parties the opportunity to participate in *de minimis* and *de micromis* settlements. In the over eleven years marginal or improperly-designated PRPs like Kao have funded studies of the LPRSA, Kao has not uncovered any evidence that the Jergens plant in Belleville, New Jersey produced or discharged any dioxin, furans, PCBs, mercury, or other

Eric Schaaf, Esq.
April 10, 2015
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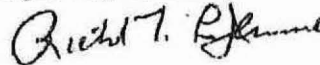
contaminants of concern. If EPA did not possess sufficient information in 2007, it certainly has enough information to begin discussions regarding *de minimis* and *de micromis* settlements now that the FFS and the RI Report are available.

Kao intends to continue to observe its obligations under the previously signed administrative orders pertaining to the LPRSA. As discussed above, we believe discussions regarding potential *de minimis* and *de micromis* settlements would complement efforts to remediate the LPRSA; and therefore, beginning discussions regarding potential *de minimis* and *de micromis* settlements at this time is in the public interest.

Like the parties to the March 10, 2015 letter from Daniel Riesel, Kao is committed to cooperating in development of potential *de minimis* and *de micromis* settlements for the LPRSA and would like to meet with representatives from EPA to discuss a process for moving forward with *de minimis* and *de micromis* settlements.

Thank you for your consideration. Please send all questions and comments to Richard T. La Jeunesse at rlajeunesse@graydon.com and M. Zack Hohl at zhohl@graydon.com.

Respectfully submitted,



Richard T. La Jeunesse

RTL:srh

cc: Walter Mugdan
Dennis R. Ward, Esq.

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GRAYDON HEAD
LEGAL COUNSEL | SINCE 1871

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September 9, 2015

**VIA CERTIFIED MAIL
(RETURN RECEIPT REQUESTED)**

Eric Schaaf, Esq.
Regional Counsel
United States Environmental Protection Agency Region II
290 Broadway
New York, NY 10007-1866

Re: Letter dated April 10, 2015 regarding Passaic River De Minimis Settlement

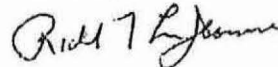
Dear Mr. Schaaf:

We represent Kao USA Inc. ("Kao") in connection with matters related to the 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay. This communication follows up on our letter dated April 10, 2015 (the "Letter") in which we respectfully requested the opportunity to meet with representatives from EPA to discuss a process for moving forward with potential *de minimis* and *de micromis* settlements. Enclosed for your reference please find a copy of the Letter.

To date we have not received any response to the Letter. While we understand that EPA intends to issue a Record of Decision for the lower eight miles of the Lower Passaic River sometime in the coming months, we believe initiating discussions regarding potential *de minimis* and *de micromis* settlements at this time would benefit EPA's efforts in the Passaic River and address a substantial injustice in keeping potentially *de minimis* or *de micromis* parties engaged in this costly matter.

Thank you for your consideration. Please respond or if any questions direct to Richard T. La Jeunesse at rlajeunesse@graydon.com and M. Zack Hohl at zhohl@graydon.com.

Respectfully submitted,



Richard T. La Jeunesse

RTL:srh
Enclosure

cc: Walter Mugdan, EPA
Dennis R. Ward, Esq., Kao USA INC., Vice President, Regional Executive Officer,
Legal and General Counsel, Americas
M. Zack Hohl, Esq.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
290 BROADWAY
NEW YORK, NEW YORK 10007-1866

October 30, 2015

BY EMAIL & US MAIL

William H. Hyatt, Jr., Esq.
KL Gates, LLP
One Newark Center, 10th Floor
Newark, NJ 07102

Re: Diamond Alkali Superfund Site - Lower Passaic River Study Area

Dear Bill:

This will respond to your letter dated August 18, 2015, submitted on behalf of the LPRSA Cooperating Parties Group ("CPG").

Your letter informs EPA that the CPG has discontinued its preliminary allocation effort. You also clarify that the preliminary allocation effort was initiated by the CPG in relation to a remedial approach for the LPRSA that the CPG is developing, and was not intended to relate to any remedy that EPA may select in a Record of Decision ("ROD") based on the Proposed Plan for the lower 8.3 miles of the LPRSA. We appreciate the clarification.

Notwithstanding the CPG's position as articulated in your letter, EPA would like to note that we have been contacted by counsel for a number of members of the CPG, asking EPA to initiate discussions regarding a settlement process, and/or to include them in any future discussions concerning *de minimis* settlements for the LPRSA.

As EPA has explained to CPG members that have contacted EPA individually about settlement opportunities, it is our view that until we issue a ROD, it would be premature to discuss settlement; and we do not think that meeting with individuals, or subgroups of potentially responsible parties, would be productive..

If you have further questions or concerns, please do not hesitate to contact me at 212-637-3136.

Sincerely,

A handwritten signature in cursive script that reads "Sarah P. Flanagan".

Sarah P. Flanagan
Assistant Regional Counsel

cc: Gary P. Gengel, Esq., Latham & Watkins LLP
Richard T. LaJeunesse, Esq., Graydon Head & Ritchey LLP
Duke K. McCall, III, Esq., Morgan Lewis & Bockius LLP
Charles E. Merrill, Esq., Husch Blackwell LLP
Miriam E. Villani, Esq, Sahn Ward Coschignano, PLLC
Dan Riesel, Esq., Sive Paget & Riesel P.C.

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March 18, 2016

VIA FEDEX

Sarah P. Flanagan, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency Region II
290 Broadway
New York, NY 10007-1866

Re: Passaic River De Minimis Party Discussions

Dear Ms. Flanagan:

We represent Kao USA Inc. ("Kao") in connection with matters related to the 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay. This communication follows up on two letters sent to Regional Counsel Eric Schaaf, dated April 10, 2015 and September 9, 2015 (the "Letters") in which we respectfully requested the opportunity to meet with representatives from EPA to discuss a process for moving forward with potential *de minimis* and *de micromis* settlements. Enclosed for your reference please find a copy of the Letters.

We are also in receipt of your letter to William H. Hyatt, Jr., Esq. dated October 30, 2015 (a copy of which is enclosed for your reference), on which you also copied me and in which you stated as follows:

EPA would like to note that we have been contacted by counsel for a number of members of the CPG, asking EPA to initiate discussions regarding a settlement process, and/or to include them in any future discussions concerning *de minimis* settlements for the LPRSA.

As EPA has explained to CPG members that have contacted EPA individually about settlement opportunities, it is our view that until we issue a ROD, it would be premature to discuss settlement.

EPA issued a Record of Decision for the lower eight miles of the Lower Passaic River on Friday, March 4, 2016. The Andrew Jergens Company (now Kao USA Inc.) voluntarily participated in the Administrative Order on Consent for Remedial Investigation of the Feasibility Study dated February 13, 2004, and Kao has since reluctantly participated in two additional administrative orders regarding the study and remediation of the LPRSA. In the over twelve years that marginal or improperly designated PRPs like Kao have funded studies of the LPRSA, Kao has not uncovered any evidence that Jergens produced or discharged any dioxins, furans, PCBs, mercury, copper or other contaminants of concern into the LPRSA.

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Sarah P. Flanagan, Esq.
March 18, 2016
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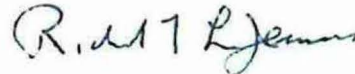
During the over twelve years since the February 13, 2004 AOC was signed, Kao has not been given any opportunity to directly respond to the merits of EPA's allegations that Kao discharged contaminants of concern into the LPRSA. EPA has previously postponed discussions with potential *de minimis* and *de micromis* parties like Kao pending issuance of the ROD.

Now that a ROD has been issued, Kao respectfully requests to be included in discussions regarding potential *de minimis* and *de micromis* parties, and that those discussions and deliberations get underway promptly. Kao maintains that its association as a PRP over this extended period is and has been most inappropriate and inequitable.

Please include us in all future communications, discussions and deliberations concerning *de minimis* settlements for the LPRSA.

Thank you for your consideration. Please let us know when you or another EPA representative would be available to discuss this matter further.

Respectfully submitted,



Richard T. La Jeunesse

RTL:srh
Enclosures

cc: Eric Schaaf, Esq., Regional Counsel, USEPA-Region II
Walter Mugdan, Director, Emergency and Remedial Response Division, USEPA-Region II
Dennis R. Ward, Esq., Kao USA, INC., Vice President, Regional Executive Officer
M. Zack Hohl, Esq., Graydon Head

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April 12, 2016

VIA FEDEX AND ELECTRONIC MAIL

Nicoletta Di Forte
Deputy Director for Enforcement
Emergency and Remedial Response Division
United States Environmental Protection Agency Region II
290 Broadway
New York, NY 10007-1866

Copy to:

Sarah P. Flanagan, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
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290 Broadway
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Juan Fajardo, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
Region II
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New York, NY 10007-1866

**Re: Diamond Alkali Superfund Site, Lower 8.3 Miles of the Lower Passaic River,
Essex and Hudson Counties, New Jersey**

**De Micromis, De Minimis and Cash-Out Settlement Discussions
to include Kao USA Inc.**

Dear Ms. Di Forte:

We represent Kao USA Inc. ("Kao") in connection with matters related to the lower 8.3 miles of the Lower Passaic River and urge that Kao be included in any *de micromis, de minimis* or cash-out settlement discussions and deliberations.

We are in receipt of your letter dated March 31, 2016 to over 100 parties, including Kao, regarding notice of potential liability under 42 U.S.C. § 9601(a) (the "Notice Letter"), in which you indicate that EPA has decided not to use the special notice procedures but that some of the parties identified as PRPs under CERCLA may be eligible for a cash-out settlement with EPA for the lower 8.3 miles of the Lower Passaic River.

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We previously sent EPA Region II representatives three recent letters on behalf of Kao dated April 10, 2015, September 9, 2015 and March 18, 2016 (the "De Minimis Letters") in which we respectfully requested the opportunity to meet with representatives from EPA to discuss a process for moving forward with potential *de minimis* and *de micromis* settlements. Enclosed for your reference please find a copy of the De Minimis Letters.

As previously discussed in our De Minimis Letters, Kao is not aware of any evidence that the Andrew Jergens Company ("Jergens"), the predecessor to Kao, produced or discharged any dioxin, furans, PCBs, mercury or contaminants of concern identified in the March 4, 2016 Record of Decision at its former plant in Belleville, New Jersey, which plant was sold in 1975.

The extremely minimal nexus alleged concerning the former Jergens plant in Belleville, New Jersey consists of a single, very minor episode reported in the 1973 Annual Report by the Passaic Valley Sewerage Commission ("PVSC"). At that time, Jergens had applied for a boiler blowdown discharge permit for hot boiler water discharge into the nearby Second River about one and a half miles upstream from its connection point into the Passaic River approximately at River Mile 8.1. In October, 1973 the PVSC inspected and sampled, characterizing the boiler blowdown as "polluting" without further defining the term or the reason for the characterization. The PVSC suggested installation of a blowdown tank to catch the discharge and eventually route into the sanitary system. That installation was made and the PVSC reported completion of the work in December 1973, eliminating any polluting issue. As a consequence of the current proceedings, Kao retained a national boiler expert who conducted a detailed examination of the boiler situation and determined that any blowdown discharged from the boiler at the former Jergens plant in Belleville, New Jersey would not have contained any hazardous substances, as defined under CERCLA. Kao's boiler expert determined that the heat of the boiler blowdown would have been the reason PVSC characterized the boiler blowdown as "polluting." Such minimal connection does not justify inclusion of Kao in this matter. We would be pleased to review the details of such findings with your office in greater detail.

Jergens manufactured lotions, hand/face creams, shampoos/conditioners, essential oils (i.e. fragrance), and foundation powder make-up at its then-new Belleville facility from approximately 1940 until 1975, when the plant was sold to a third party for other uses. These Jergens non-toxic, non-hazardous personal care products are manufactured for direct application to human skin and safe disposal in domestic waste streams, and the products have been used in such a capacity for over 130 years. No hazardous substances would have been discharged as a result of operations at the former Jergens plant in Belleville, New Jersey, and therefore, the operations did not in any way contribute to the contamination of the Passaic River or the Lower Passaic River Study Area.

Jergens should not have been designated as a PRP, yet Jergens and Kao have reluctantly participated and cooperated in extensive and very costly investigations and studies of the Lower Passaic River for over a dozen years, all without EPA providing Kao an opportunity to have a fair and balanced determination on the merits of Kao's appropriate classification as a *de minimis*, *de micromis* or non-labile party.

Please include us in all future communications, discussions and deliberations concerning *de micromis*, *de minimis* and cash-out settlements for the lower 8.3 miles of the Lower Passaic River.

April 12, 2016
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Thank you for your consideration. Please let us know when the appropriate EPA representative would be available to discuss this matter further.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Richard T. La Jeunesse".

Richard T. La Jeunesse

RTL:srh
Enclosures

cc: Dennis R. Ward, Esq. Kao USA Inc., Vice President, Regional Executive Officer
Eric Schaaf, Esq. Regional Counsel, USEPA-Region II
Walter Mugdan, Director, Emergency and Remedial Response Division, USEPA-Region II
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May 25, 2016

VIA FEDEX AND ELECTRONIC MAIL

Sarah P. Flanagan, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency,
Region II
290 Broadway, 19th Floor
New York, NY 10007-1866

**Re: Diamond Alkali Superfund Site, Lower 8.3 Miles of the Lower Passaic River,
Essex and Hudson Counties, New Jersey**

**De Micromis, De Minimis and Cash-Out Settlement Discussions
to include Kao USA Inc.**

Dear Ms. Flanagan:

Following up on prior communications please recall that our law firm represents Kao USA Inc. ("Kao") in connection with matters related to the lower 8.3 miles of the Lower Passaic River. **We again urge that Kao be included in any *de micromis*, *de minimis* or cash-out settlement discussions and deliberations.** This letter also specifically refutes any alleged impact that a minor incident of hot boiler water discharge into the nearby Second River in 1973 would or could have impacted the Passaic River.

We previously sent EPA Region II representatives four recent letters on behalf of Kao dated April 10, 2015, September 9, 2015, March 18, 2016 and April 12, 2016 (the "De Micromis/De Minimis Letters"), in which we respectfully requested the opportunity to meet with representatives from EPA to discuss a process for moving forward with potential *de minimis* and *de micromis* settlements. Enclosed for your reference please find a copy of the De Micromis/De Minimis Letters.

As previously discussed in our De Micromis/De Minimis Letters, the extremely minimal nexus alleged concerning the Andrew Jergens Company ("Jergens"), the predecessor to Kao, consists of a very minor episode reported in the 1973 Annual Report by the Passaic Valley Sewerage Commission ("PVSC"). At that time, Jergens had applied for a boiler blowdown discharge permit for hot boiler water discharge into the nearby Second River about one and a half miles upstream from its connection point into the Passaic River approximately at River Mile 8.1. In October, 1973 the PVSC inspected and sampled boiler blowdown discharge from the facility and subsequently characterized the boiler blowdown as "polluting" without further defining the term or the reason for the characterization. By December 1973 the PVSC reported installation of a blowdown tank and

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hookup to the PVSC system "thus eliminating this pollution." As a consequence of the current proceedings, Kao retained a national boiler expert who conducted a detailed examination of the boiler situation. Kao's boiler expert determined that the heat of the boiler blowdown water would have been the reason PVSC characterized the boiler blowdown as "polluting."

The boiler system was a closed loop in which hot steam would have been used for heating purposes, condensed back into water, and returned to the boiler. As was typical with all boilers, water would have been discharged from the boiler in order to prevent salty deposits that could adversely impact the operation of the boiler. No new substances or compounds would have been created in the boiler, which would have been a closed system with the exception of the feed water coming in and the blowdown going out. Further, because any of the salts from the boiler blowdown would have been dissolved in water, nothing in the boiler blowdown discharge would have settled in the Second River or Lower Passaic River beds.

Jergens would not have discharged any of the chemicals of concern from its former facility in Belleville, New Jersey (thus putting Kao well below *de micromis* thresholds). In spite of the lack of evidence establishing any releases or threatened releases of hazardous substances from the former Jergens facility, for over thirteen years Jergens and Kao have voluntarily participated in studies and even active remediation of the Passaic River without the opportunity to rebut EPA's initial overly-broad tagging of Kao as a potentially responsible party with respect to the Lower Passaic River Study Area. The delay in this process pending issuance of the recent ROD has had an extremely unfair and inequitable impact upon Kao.

We are encouraged that EPA has indicated that certain parties could soon be eligible for cash-out settlements, and we remain hopeful that this process may be expedited. Please include Kao in any future communications regarding *de minimis*, *de micromis* and cash-out settlements. Should you need any additional information regarding Jergens' operations at the former Belleville, New Jersey facility, please let us know.

Thank you for your consideration. Please let us know when the appropriate EPA representative would be available to discuss or communicate further on this matter further.

Respectfully submitted,


Richard T. La Jeunesse

RTL:srh

Enclosures

cc: Eric Schaaf, Esq. Regional Counsel, USEPA-Region II
Juan Fajardo, Esq. Assistant Regional Counsel, USEPA-Region II
Walter Mugdan, Director, Emergency and Remedial Response Division, USEPA-Region II
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